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Corporation and The Hershey Company

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

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For
Ed.

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

HUHTAMAKI FINANCE, B.V., a
Netherlands corporation; HERSHEY
CHOCOLATE &
CONFECTIONERY
CORPORATION, a Delaware
corporation; and THE HERSHEY
COMPANY, a Delaware
corporation,

Plaintiffs,

vs.

KENNETH DEAN AFFOLTER, an
individual, dba BEYOND BOMB,

Defendant.

CASE NO. **C07-02514 RS**

COMPLAINT FOR:
TRADEMARK INFRINGEMENT;
TRADEMARK DILUTION;
UNFAIR COMPETITION; AND
INJUNCTIVE RELIEF

Jury Trial Demanded

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NOTICE OF ASSIGNMENT
TO MAGISTRATE JUDGE SENT

COMES NOW PLAINTIFFS HUHTAMAKI FINANCE, B.V., HERSHEY
CHOCOLATE & CONFECTIONERY CORPORATION and THE HERSHEY
COMPANY, and complain against Defendant KENNETH AFFOLTER dba
BEYOND BOMB as follows:

JURISDICTION AND VENUE

1 1. This action arises under Sections 32 and 43 of the Lanham Act, 15
2 U.S.C. §§ 1114 and 1125. This Court's jurisdiction is invoked pursuant to 15
3 U.S.C. § 1121(a), 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a) in that this civil
4 action arises under the laws of the United States, in particular the Lanham Act, 15
5 U.S.C. §§ 1114 and 1125. In the case of claims for relief arising under state law,
6 this Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1338(b) and 1367 and
7 the doctrine of supplemental jurisdiction in that these claims are substantial and
8 related to the trademark claims and form part of the same case and controversy.
9 Venue is proper in the United States District Court for the Southern District of
10 California pursuant to 28 U.S.C. § 1391(b) in that a substantial part of the events
11 giving rise to the claims occurred within the District, and Defendant was and is
12 subject to personal jurisdiction in the District at the time the action was
13 commenced.

THE PARTIES

15 2. Plaintiff Huhtamaki Finance, B.V. (hereafter "Huhtamaki") is a
16 corporation organized and existing under the laws of the Netherlands, with its
17 principal place of business located in Hoofddorp, the Netherlands.

18 3. Plaintiff Hershey Chocolate & Confectionery Corporation (hereafter
19 "Hershey C&C") is a Delaware corporation with its principal places of business
20 located in Oakdale, California and Robinson, Illinois.

21 4. Plaintiff The Hershey Company (hereafter "Hershey Co.") is a
22 Delaware corporation with its principal place of business located in Hershey,
23 Pennsylvania.

24 5. Plaintiffs are informed and believe that Defendant Kenneth Affolter
25 (hereafter "Defendant") is an individual formerly residing in, and doing business
26 in, the City of Oakland, in the County of Alameda, California.
27
28

1 6. Plaintiff Huhtamaki, as owner, and Hershey C&C and Hershey Co., as
2 licensee and sublicensee, respectively, are the source of a variety of goods offered
3 under the mark JOLLY RANCHER, which goods include candy. The JOLLY
4 RANCHER mark has been used in commerce by Plaintiffs, their licensees and
5 their predecessors in interest, since at least as early as 1950. Attached hereto as
6 Exhibit 1 and incorporated herein by reference are photographs of candy packages
7 currently in use in the United States and bearing the mark JOLLY RANCHER.
8 Plaintiff Hershey C&C, as owner, and Hershey Co., as licensee, respectively, are
9 the source of a variety of goods offered under the mark REESE'S, which goods
10 include candy. The REESE'S mark has been used in commerce by the Hershey
11 plaintiffs, and their predecessors in interest, since at least as early as 1919.
12 Attached hereto as Exhibit 2 and incorporated herein by reference are photographs
13 of candy packages currently in use in the United States and bearing the mark
14 REESE'S. The marks JOLLY RANCHER and REESE'S are referred to hereafter
15 jointly as "Plaintiff Marks."

16 7. Plaintiffs and their predecessors in interest have continuously used the
17 mark JOLLY RANCHER in commerce throughout the various states of the United
18 States since the 1950s. The Hershey plaintiffs and their predecessors in interest
19 have continuously used the mark REESE'S in commerce throughout the various
20 states of the United States since at least as early as 1919.

21 8. The JOLLY RANCHER mark is the subject of U.S. Trademark Office
22 Registration No. 1,684,586, issued on April 28, 1992, and other registrations. Said
23 registration is now incontestable pursuant to the provisions of Section 15 of the
24 Trademark Act (as amended), as of April 28, 1997, and was renewed as of
25 February 12, 2002 for an additional ten year term. A true and correct copy of the
26 registration is attached hereto as Exhibit 3. The REESE'S mark is the subject of
27 U.S. Trademark Registration No., 925,609, issued on December 14, 1971, and
28 other registrations. Said registration is now incontestable pursuant to the

1 provisions of Section 15 of the Trademark Act (as amended), as of December 14,
2 1976, and was renewed for the second time as of May 8, 2001, for an additional ten
3 year term. A true and correct copy of that registration is attached hereto as Exhibit
4 4.

5 9. Plaintiff Marks have each become famous under Section 1125(c) of
6 the Lanham Act by reason of the high degree of inherent distinctiveness of their
7 arbitrary and fanciful nature, their continuous use for many years throughout the
8 entire United States, their continuous promotions for many years, and their
9 distribution in broad channels of trade throughout the United States, including but
10 not limit to through grocery stores, drug stores, candy shops, big box stores, as
11 well as adjacent to the checkout counter at a myriad of other types of stores.
12 Plaintiff Marks have both become, through widespread and favorable public
13 acceptance and recognition, distinctive marks and assets of substantial value to
14 their respective owners and licensees as a symbol of the respective goods. Vintage
15 items bearing each of Plaintiff Marks have become collectors' items. Plaintiffs
16 have developed distinctive and unique trade dress for REESE'S products,
17 consisting of orange, brown and yellow packaging in a flat package which holds
18 two candy "cups" (hereafter "REESE'S Trade Dress"). Plaintiffs have developed
19 distinctive and unique trade dress for JOLLY RANCHER products, consisting of
20 white letters in a unique font, placed over an oval with a shade line to the bottom
21 left (hereafter "JR Trade Dress"). Such Trade Dress has additionally become
22 readily recognizable by consumers and secondary meaning has been developed in
23 such Trade Dress to the benefit of Plaintiffs.

24 10. Plaintiffs, their licensees and predecessors in interest, have expended
25 money, time and effort in the advertising and promotion of their products offered
26 under and in connection with Plaintiff Marks throughout the United States. By
27 virtue of such efforts, Plaintiff Marks have become associated in the minds of the
28

1 general public with Plaintiff's, and an extensive and valuable goodwill has been
2 built up in Plaintiff Marks.

3 11. By reason of Plaintiffs', their licensees' and their predecessors' use and
4 sales of goods utilizing Plaintiff Marks and the public acceptance and awareness of
5 Plaintiff Marks in connection with their respective goods, Plaintiff Marks have
6 acquired a distinctiveness and secondary meaning signifying Plaintiffs and
7 Plaintiffs' goods.

8 12. Defendant Affolter doing business as Beyond Bomb, notwithstanding
9 Plaintiffs' well known rights, recently began using the marks STONEY
10 RANCHERS and RASTA REESE'S ("Defendant Marks") in a style and manner
11 confusingly similar to Plaintiff Marks, utilizing imitations, respectively, of the JR
12 Trade Dress and REESE's Trade Dress, in connection with candies containing
13 marijuana ("Defendant's Goods").

14 13. Plaintiffs' rights in and to the JOLLY RANCHER and REESE'S
15 marks are superior to Defendant's rights in Defendant Marks by virtue of Plaintiffs'
16 prior use, exclusive licensed rights, and the fact of federal registration of Plaintiff
17 Marks.

18 14. Due to Plaintiffs', their licensees' and their predecessors' long and
19 substantial use of Plaintiff Marks, on information and belief, Plaintiffs allege that
20 Defendant has long known of Plaintiffs' use and rights in Plaintiff Marks and in
21 Plaintiff's Trade Dress. Defendant has been on actual and constructive notice of
22 the prior rights of Plaintiffs in and to Plaintiff Marks and Plaintiff's Trade Dress.

23 15. Defendant Marks are confusingly similar to Plaintiff Marks in terms
24 of appearance, sound, and meaning. The packaging for Defendants Goods is
25 confusingly similar to the respective Plaintiff's Trade Dress.

26 16. Defendant's Goods, specifically candies containing marijuana, are
27 distributed by Defendant and purchased by Defendant's customers in the State of
28 California under the position and/or belief that California Proposition 215, the

1 Compassionate Use Act passed by California voters in 1996, legalized the sale of
2 marijuana to seriously ill Californians, provided they obtain a doctor's
3 recommendation. Since such passage, a new industry consisting of creation and
4 sale of "medical marijuana" in various forms has arisen in California, which is sold
5 at various store locations. Defendant's Goods are likely to be encountered by some
6 of the same purchasers and consumers of Plaintiff's Goods under circumstances
7 that are likely to give rise to the mistaken belief that the Plaintiffs' Goods and the
8 Defendants' Goods come from a common source or are sponsored or endorsed by,
9 or affiliated with, a single company, and, further, that Plaintiffs have taken a stand,
10 are supporters of, or play a roll in, the current public policy debate relating to
11 legalizing marijuana use for the ill.

12 **FIRST CLAIM FOR RELIEF**

13 **FOR TRADEMARK INFRINGEMENT**

14 **VIOLATION OF LANHAM ACT § 32(1)(a), 15 U.S.C. § 1114(1)(a)**

15 17. Plaintiffs reallege and incorporate herein by reference the allegations
16 made in paragraphs 1 through 16 above, as if set forth in their entirety herein.

17 18. Notwithstanding Plaintiffs' well-known and prior common-law and
18 statutory rights in Plaintiff Marks, specifically, JOLLY RANCHER and REESE'S,
19 Defendant adopted and used the substantially identical and confusingly similar
20 names and/or designations, specifically, STONEY RANCHERS and RASTA
21 REESE'S. Although Defendant is not affiliated in any way with Plaintiffs, and
22 Defendant's Goods are not authorized, endorsed, licensed or sponsored by
23 Plaintiffs, or any of them, Defendant has prominently featured the STONEY
24 RANCHERS and RASTA REEFERS names in packaging, marketing and
25 distributing Defendant's Goods. A true and correct copy of an exemplar of
26 Defendant's use of the STONEY RANCHERS and RASTA REEFERS marks
27 ("Defendant Marks") is attached hereto as Exhibit 5. Such marketing and
28 distribution of goods bearing Defendant Marks constitutes trademark infringement.

1 19. Defendant has infringed and, on information and belief, continues to
2 infringe upon the rights of Plaintiffs by marketing, advertising and distributing
3 Defendant's Goods using the designations STONEY RANCHERS and RASTA
4 REESE'S in confusingly similar Trade Dress and in a manner that is confusingly
5 similar to Plaintiff Marks.

6 20. Plaintiffs are informed and believe and based thereon allege that
7 Defendant has had actual and constructive notice of Plaintiffs' rights in Plaintiff
8 Marks since prior to Defendant's adoption of Defendant's Marks.

9 21. On information and belief, Plaintiffs allege that the use of the
10 substantially identical and confusingly similar STONEY RANCHERS and
11 RASTA REESE'S designations by Defendant is likely to cause confusion, mistake
12 and/or deception of consumers and the general public, including purchasers and
13 prospective purchasers, between the goods respectively offered by Plaintiff and
14 Defendant. Defendant's actions are likely to continue to confuse and deceive the
15 general public, purchasers and prospective purchasers to believe that Defendant's
16 Goods are in some way backed, sponsored, licensed, authorized, approved or
17 franchised by, or associated or otherwise connected with, Plaintiffs. Such
18 confusion is causing and, unless enjoined by this Court, will continue to cause
19 Plaintiffs immediate and irreparable injury and damage, and a loss of profits, in an
20 amount presently unknown, but believed to exceed \$100,000, exclusive of interest
21 and costs. In addition, Defendant has wrongly profited from his actions and should
22 account to Plaintiffs for such profits.

23 22. Defendant has intentionally used trademarks and trade dress
24 substantially similar to Plaintiffs trade dress with the intent and result of causing
25 confusion, mistake and deception among the consuming public and advertisers as
26 to the source and quality of Defendant's Goods. Defendant's acts of trademark
27 infringement have been committed willfully with the knowledge that such acts
28

1 infringed Plaintiff's rights and with the intent to cause confusion and mistake and
2 to deceive the consuming public.

3 23. There is a danger that Defendant will continue to distribute goods
4 bearing a mark and name that is confusingly similar to Plaintiffs' MARKS.

5 24. Plaintiffs have no adequate remedy at law unless Defendant's conduct
6 is enjoined by this Court.

7 **SECOND CLAIM FOR RELIEF**
8 **FOR TRADEMARK DILUTION**

9 **VIOLATION OF LANHAM ACT § 43(c), 15 U.S.C. § 1125(c)**

10 25. Plaintiffs reallege and incorporate herein by reference the allegations
11 made in paragraphs 1 through 24 above, as if set forth in their entirety herein.

12 26. This claim for relief arises under the Lanham Act, for dilution of the
13 distinctive quality of Plaintiff Marks in violation of 15 U.S.C. 1125(c).

14 27. Plaintiff Marks have been widely used and extensively advertised in
15 the United States and, therefore, Plaintiff Marks have become well known and
16 famous as distinctive symbols of Plaintiffs' goodwill. Defendant's adoption and
17 use of the substantially identical and confusingly similar designations STONEY
18 RANCHERS and RASTA REESE'S, which occurred after Plaintiffs' Marks
19 became famous, is likely to cause and is causing great injury to Plaintiffs' business
20 reputation and is resulting in dilution of the distinctive qualities of Plaintiffs
21 Marks. Likelihood of confusion, dilution, and deception is enhanced by the fact
22 that the words RANCHER and REESE'S are the dominant feature of Defendant's
23 marks and easily confused with Plaintiff Marks.

24 28. Defendant's acts of dilution have been committed willfully and with
25 knowledge that said acts infringed upon Plaintiffs' rights and with the intent to
26 trade on Plaintiffs' reputation, to dilute Plaintiff Marks, and to cause injury to
27 Plaintiffs' business and reputation.
28

1 29. Defendant threatens to continue the conduct complained of herein and
2 unless enjoined will continue such conduct all to Plaintiffs' irreparable damage.
3 Defendant's conduct will deprive Plaintiffs of the ability to protect their
4 reputations, persona, and goodwill, and will tarnish the goodwill symbolized by
5 Plaintiffs Marks. Customers who encounter Defendant's Goods will attribute the
6 avocation of usage of marijuana and other illegal acts to Plaintiffs, and this will
7 tarnish Plaintiffs' reputation and goodwill. Plaintiffs have no adequate remedy at
8 law and are suffering irreparable harm as a result of the conduct complained of
9 herein. Plaintiffs have also incurred damages and are continuing to incur damages
10 and a loss of profits in an amount not yet ascertained but believed to exceed
11 \$100,000. The exact amount of damages will be proven at trial. In addition,
12 Defendant has wrongly profited from his actions and should account to Plaintiffs
13 for such profits.

14 **THIRD CLAIM FOR RELIEF**
15 **FOR DILUTION IN VIOLATION**
16 **OF CALIFORNIA BUSINESS AND PROFESSIONS CODE**
17 **SECTION 14330**

18 30. Plaintiffs reallege and incorporate herein by reference the allegations
19 made in paragraphs 1 through 29 above, as if set forth in their entirety herein.

20 31. This claim for relief arises under California Business & Professions
21 Code § 14330 for dilution of the distinctive quality of Plaintiff Marks.

22 32. The acts of Defendant, unless enjoined and restrained, are likely to
23 cause injury to the business reputation of Plaintiffs and to dilute the distinctive
24 quality of Plaintiff Marks.
25
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**FOURTH CLAIM FOR RELIEF
FOR UNFAIR COMPETITION UNDER
CALIFORNIA COMMON LAW AND
BUSINESS & PROFESSIONS CODE SECTION 17200**

33. Plaintiffs reallege and incorporate herein by reference the allegations made in paragraphs 1 through 32 above, as if set forth in their entirety herein.

34. This claim for relief arises under the California law of unfair competition, California Business & Professions Code § 17200, et seq., and California common law.

35. As described herein, Defendant has engaged in acts of unfair competition which injures the business, goodwill and contractual and business relationships of Plaintiffs.

36. The acts of Defendant have been committed with full knowledge of their impropriety and with the intent to injure the business of Plaintiffs. Said acts were accomplished by means of the deceptive use of a designation for Defendant's products substantially identical and confusingly similar to that used by Plaintiffs with respect to their goods.

37. As a direct and proximate result of Defendant's conduct, Plaintiffs have suffered damages in an amount not yet ascertained but believed to exceed \$100,000, exclusive of interest and costs, and a loss of profits. The precise amount of said damages will be proven at trial. In addition, Defendant has wrongly profited from his actions and should account to Plaintiff for such profits.

38. At the time Defendant committed the acts alleged herein, Defendant was guilty of fraud, oppression, malice and willful and conscious disregard of the rights of Plaintiffs in that Defendant willfully adopted and used a substantially identical and confusingly similar mark. Defendant committed the aforementioned acts of unfair competition with a conscious disregard of the rights of Plaintiffs.

1 Plaintiffs have been injured and are entitled to an award of punitive and exemplary
2 damages in an amount to be proven at trial.

3 39. Defendant's violations as alleged herein are continuing and unless
4 restrained will cause irreparable injury to Plaintiffs' business and property for
5 which Plaintiffs have no adequate remedy at law.

6 **FIFTH CLAIM FOR RELIEF FOR**
7 **INJUNCTIVE RELIEF**

8 40. Plaintiffs reallege and incorporate herein by reference the allegations
9 made in paragraphs 1 through 39 above, as if set forth in their entirety herein.

10 41. Plaintiffs have no adequate legal remedy for the conduct alleged
11 above by Defendant and will suffer great and irreparable injury unless said acts by
12 Defendant are enjoined and restrained. Defendant's trademark infringement and
13 unfair competition will cause Plaintiffs to suffer great and irreparable injury in that,
14 inter alia, Defendant's conduct will injure Plaintiffs' business and is likely to
15 deceive consumers and the public, and will dilute Plaintiffs' mark. There is no way
16 to ascertain the actual economic damages suffered, or that will be suffered, by
17 Plaintiffs as a result of Defendant's continued conduct as described above.

18 42. Therefore, Plaintiffs are entitled to a preliminary injunction and
19 permanent injunction enjoining Defendant from continuing to use the designations
20 STONEY RANCHERS and RASTA REESE's in connection with Defendant's
21 Goods, or to otherwise infringing any of Plaintiff's trademarks and trade dress in
22 such a manner.

23 WHEREFORE, Plaintiffs respectfully pray that this Court:

24 1. Issue a preliminary injunction, enjoining and prohibiting Defendant
25 KENNETH DEAL AFFOLTER, and his agents, servants, employees, officers,
26 attorneys, successors and assigns from:

27 (a) Using the STONEY RANCHERS, or RASTA REESE'S
28 trademarks or trade dress, or any mark or trade dress confusingly similar to JOLLY

1 RANCHER or REESE'S in connection with the description, marketing, promotion,
2 advertising or sale of any goods whatsoever;

3 (b) Infringing any of Plaintiffs' trademarks;

4 (c) Diluting any of Plaintiffs' trademarks;

5 2. Order an award of damages in an amount to be determined at trial;

6 3. Order an award of treble damages as provided by Section 35(a) of the
7 Lanham Act;

8 4. Order an award of attorneys' fees and costs as provided by Section
9 35(a) of the Lanham Act;

10 5. Order an award of prejudgment interest on all damages awarded;

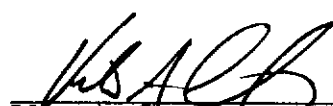
11 6. Order an award of punitive and exemplary damages; and

12 7. For such other and further relief as the Court deems just and proper.

13
14 Date: May 9, 2007

HOLLAND & KNIGHT LLP

15
16 By:


Vito A. Costanzo
Attorneys for Plaintiffs Huhtamaki
Finance, B.V., Hershey Chocolate &
Confectionery Corporation and The
Hershey Company

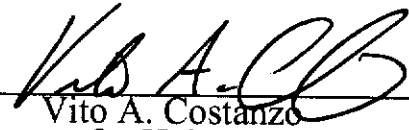
REQUEST FOR A JURY TRIAL

Plaintiff hereby requests a jury trial on those causes of action triable to a jury.

Date: May 8, 2007

HOLLAND & KNIGHT LLP

By:



Vito A. Costanzo
Attorneys for Huhtamaki Finance,
B.V., Hershey Chocolate &
Confectionery Corporation and The
Hershey Company

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